

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Final Decision

**Linda Ellen Fisher,
Complainant**

GRC Complaint No. 2002-39

v.

**Township of Fairfield (Essex),
Custodian of Record.**

**Decision Issued: September 11, 2003
Decision Effective: September 15, 2003**

At its September 11, 2003 public meeting, the Government Records Council considered Complaint No. 2002-39 filed pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., challenging the custodian's failure to provide access to the most recent invoice from outside counsel.

The custodian provided access to a June 26, 2002 invoice from Jeffrey R. Surenian, Esq. for services rendered in on-going litigation but redacted the description of services on the ground it constituted attorney-client privileged material that was exempt from access under N.J.S.A. 47:1A-1.1. The custodian provided access to non-privileged segments of the redacted material on June 26, 2002. After communication between requestor and custodian and inquiry between Council staff and the custodian's attorney, access was provided to all remaining redacted material on or about August 20, 2003 on the grounds the underlying litigation was concluded and the need for redaction had been "obviated."

The Council considered the requestor's complaint and attachments: the custodian's Statement of Information and attachments; communications on behalf of the requestor dated July 23, October 30 2002 and January 11, March 9, April 3 and May 19, 2003; communications on behalf of the custodian dated July 10 and August 9, 2002 and January 8, March 17, May 19, August 12 and 20, 2003; GRC staff communications dated August 11, 2003; the Preliminary Findings and Recommendation of the Acting Executive Director dated March 5, 2003; and the Findings and Recommendations of the Acting Executive Director dated September 8, 2003 that:

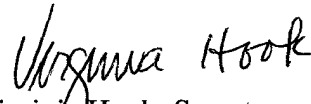
- Access had been provided to the government record sought;
- The custodian did not knowingly and willfully violate OPRA;
- The requestor was not a "prevailing party," and therefore,
- That the complaint should be dismissed.

By affirmative vote of five Council members at its September 11, 2003 meeting, the Council voted to adopt and incorporate the Director's September 8, 2003 Findings and Recommendation and dismiss the complaint.

A copy of this Order shall be provided to the requestor, the custodian and all legal counsel of record.


VINCENT MALTESE, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council:


Virginia Hook, Secretary
Government Records Council
Dated: September 15, 2003

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendation of Executive Director
September 5, 2003**

**Linda Ellen Fisher,
Complainant**

v.

**Township of Fairfield (Essex),
Custodian of Record.**

GRC Complaint No. 2002-39

Relevant Record(s) Requested: most recent attorney's bill or invoice from an outside private attorney hired by the Township of Fairfield

Request made: July 8, 2002

Custodian: Patricia Fahy, Clerk

Request denial: July 17, 2002

GRC Complaint filed: August 30, 2002

Executive Director's Recommendation

This complaint involves the disclosure of an attorney fee voucher that was initially disclosed with redactions. Over the course of the investigation, and through correspondence between the parties and the Council, the custodian revealed additional while maintaining other redactions. At issue were the justifications for the use of the attorney client privilege, a subsequent claim of the advisory, consultative, and deliberative exception by the custodian, and the challenge to the privilege presented by the disclosure of information to a legal adversary.

The custodian recently produced the full, unredacted invoice. Because the custodian has voluntarily disclosed the requested record, the requestor is not a prevailing party for the purposes of awarding attorney fees under OPRA. Although the custodian and custodian counsel was less than thorough in complying with the OPRA requirements for providing an explanation why information was redacted from the requested record, there is no evidence to support a finding that the custodian knowingly and willfully violated OPRA.

Under these circumstances, the Executive Director recommends that this complaint be dismissed.

Statements of Facts

Requestor sought, among other items, “the most recent attorney’s bill or invoice from an outside private attorney hired by the Township of Fairfield.

In a July 10 2002, letter to the requestor, the custodian offered to provide a redacted copy of an invoice dated June 26, 2002 for services rendered by Jeffrey R. Surenian, Esq. of “Lomell Law Firm” in Toms River in connection with Sterling v. Fairfield, currently in litigation. The invoice contained an internal file number, eight dates in May on which services were rendered, the attorney’s initials (“JRS”), the time expended by this special counsel and the bill for each service. The custodian redacted the entire description of the services rendered on all dates, claiming the Township was “in on-going litigation.”

By letter dated July 23, 2002, the requestor’s attorney asked the custodian’s attorney to state the specific reasons for the redaction, to describe the material redacted, and rejected the claim that the attorney-client privilege justified the redactions.

By letter dated August 9, 2002, the custodian’s attorney, David Paris, advised the requestor that the redacted material included a description of the work performed in representation of the Township in litigation, which was withheld pursuant to the attorney-client privilege and OPRA.

The Denial of Access Complaint was filed August 30, 2002. On September 3 2002, the custodian’s attorney wrote the GRC asking that the matter go into mediation. Mediation was unsuccessful and the matter proceeded to adjudication.

In a Statement of Information filed October 29, 2002, the custodian claimed that the complaint was frivolous and the claims and requested relief were without factual basis. He argued that attorney bills of active litigation could be redacted to protect attorney-client privilege pursuant to OPRA. He asserted that the Township would be at a severe disadvantage in litigation if it was required to disclose the services performed by its counsel, information that would not be accessible from a non-public entity litigant.

On October 30, 2002, the requestor supplemented its complaint, alleging that that the custodian waived the attorney client privilege by not asserting that defense in its initial response to the OPRA request; that the custodian had provided no information for the Council to deduce that the information being withheld related to material commonly considered attorney-client privileged; and that the custodian had failed to justify denial of access as required by N.J.S.A. 47:1A-6.

Custodian counsel provided numerous examples of invoices from other public entities' counsel, claiming that where the description of services contains privileged information, the agency redacts the privileged material and provides access to the remainder of the document.

In late December 2002, the GRC contacted the parties to determine whether settlement of the matter was possible. In response to this communication, custodian's counsel provided the requestor's attorney an amended invoice attached to a January 8, 2003 letter.

In the letter, the custodian's counsel stated that the services rendered were in connection with negotiation of a settlement between the Township and a litigation adversary, which was not yet finalized. Nevertheless, services described on four dates were revealed in their entirety. The other entries were revealed but had some information redacted. Counsel noted that the redacted material was:

- (a) "...identities of Township representatives dealing with the attorney;
- (b) ...the subject matter of discussions held by Township representatives and opposing counsel with legal counsel for the Township; [and]
- (c) ...the subject matter of other forms of communications between Township attorney and Township representatives."

By letter dated January 11, 2003, the requestor's attorney alleged the Township had failed to prove that the exemption based on ongoing litigation is valid under the law; that the custodian's claim of privilege based on settlement negotiations was untimely and, therefore, waived; that Fairfield had not established how disclosure of the redacted information would compromise the negotiations or other privileged communications; that discussions with opposing counsel were not attorney-client privileged; that the identities of Township personnel speaking to the attorney were not privileged; and that only the substance of a communication would be privileged, but not the subject matter. Requestor's counsel stated that access to the full invoice should be required because OPRA was enacted, in part, to provide access to bills and contracts to see what work was being performed at public expense.

Copies of the Council's March 5, 2003, Preliminary Findings and Recommendations (PFR) were provided to the record custodian and the attorneys for the complainant and the custodian. It recommended that the Council order the custodian to provide the requestor and the Council by a date certain a full explanation of why each redaction was privileged or non-accessible under OPRA or to provide access to the redacted material. The participants were requested to provide any supplemental material not later than March 10.

In a March 9, 2003 letter, the requestor's counsel responded to the PFR. He argued that Rules of Court 4:6-2 and -3 were inapplicable to his waiver argument. He disputed the finding that the custodian articulated the attorney-client privilege in all of the GRC filings. He asserted that the failure to claim the privilege was not alone, but rather such failure was in the context of OPRA that requires the custodian to provide a reason for redactions.

The custodian's attorney submitted a letter and certification of himself dated March 17, 2003. The certification described the invoice the general subject matter of each redaction on the invoice and why that subject was a privileged communication. All redacted material relates to the

Township's defense of specific litigation in Essex County Superior Court or discussion of settlement options between the Township and its attorney. He identified the attorney-client and the deliberative process privileges as the basis for the redactions and identified the name of the opposing counsel.

Custodian's counsel also provided the requestor and the Council an amended redacted copy of the June 26, 2002, invoice for legal services at issue. In this invoice, the custodian's attorney provided access to information which had formerly been redacted but which the Executive Director had suggested was not privileged, specifically, the identities of Township personnel speaking to the attorney and discussions with opposing counsel. However, he continued to redact the subject matter of the discussion with opposing counsel. The custodian's counsel did not expressly state that the custodian agreed with the PFR's findings that the material was not privileged but stated only that access was being provided "to comport with the findings of the Draft [PFR]."

Counsel also apologized to the Council for not responding to the March 5th communication sooner, stating that the custodian was committed to full and complete cooperation with the Council. Counsel stated that the custodian's response was delayed due to confusion as to whether Council procedures required further response from the custodian.

By letter dated April 3, 2003, requestor's attorney acknowledged receipt of some of the previously redacted material via the custodian's March 17th letter, but objected to the remaining six redactions. In the letter, the requestor's attorney asserts and argues that:

1. The custodian failed to adequately demonstrate that the redacted information is exempt
2. Not all attorney-client communications are privileged
3. Despite the statements in the PFR, the custodian continued to redact the subject matter of a discussion with opposing counsel.
4. The custodian's claim of privilege based upon "deliberative process during litigation" is not authorized under OPRA, but if intended to refer to the exception for "inter-agency or intra-agency advisory, consultative, or deliberative material", that privilege is limited to communications between government agencies and not between two lawyers.
5. The Township attorney had been performing a litigation function and not a governmental function, and, in any event, should be rejected out of hand as untimely.
6. The requestor is a prevailing party under OPRA because the client won something significant, because there is a casual relationship between the filing of the Complaint and the release of the majority of the previously redacted information, and because there was a basis under the law for the Complaint.

In response, the custodian's counsel submitted a May 19, 2003, letter asserting the necessity of maintaining the six redactions on the invoice based on the attorney-client and deliberative process during litigation privileges. He argued that a government record does not include inter-agency or intra-agency advisory, consultative or deliberative material. He asserted that the same type of exception could be found in the Open Public Meetings Act. He argued that the Township was only protecting the privacy of its proceedings during litigation as it was expected to do.

Regarding attorney's fees, custodian's counsel argued as follows:

1. That the requestor had not met the two-prong test required to be a prevailing party.
2. That the requestor was not a prevailing party, because an enforceable judgment, consent decree or settlement, had been received, and thus had not obtained a sufficient degree of success on the merits to be a prevailing party.
3. That because the Council had made no decision regarding the merits of the redactions, the requestor failed to show that the relief she received had a basis in the law.
4. That the Township had made a good faith effort to comply with OPRA statutory requirements.

The requestor's attorney responded with a May 19, 2003, letter raising a series of arguments refuting the legal basis on which the custodian counsel concluded that the requestor was not a prevailing party. He also argued that while good faith of the custodian was irrelevant to an award of fees, the custodian's six-month blanket claim of privilege is not good faith.¹

To resolve the issue of why information shared with opposing counsel was privileged, the Executive Director asked the custodian in a letter dated August 11, 2003, for a detailed explanation as to why the attorney-client and deliberative process privileges would continue to protect information that was already disclosed to opposing counsel. He also asked her to identify the name and title of the person who authorized disclosure of the information on behalf of the Township.

In a response dated August 12, 2003, the custodian's counsel advised that the underlying litigation had been settled. He stated that the concerns that existed prior to resolution of the litigation had been resolved and there no longer remained a basis for redaction. He indicated that he would await direction from the GRC, but was prepared to provide the documents to the requestor. Regarding the identity of the person who authorized disclosure, he stated that the township had been represented by special litigation counsel. He stated that the May 7, 2002, entry is the only entry regarding such a communication, and that the remaining redactions deal with communications between the special litigation counsel and officials of the Township, its attorneys and experts. As a result, he argued, the attorney-client and deliberative process privileges apply to those entries.

In response, the Acting Executive Director advised that he could not advise or direct him on providing access to the redacted material. He requested that the custodian's counsel advise the GRC if he provided access to the information.

In an August 20, 2003 letter, custodian's counsel advised the Council that he was forwarding the unredacted document to the requestor. He indicated that the conclusion of the on-going litigation had obviated the necessity for the redaction. He requested the matter be removed from the Council's consideration as moot.

¹ This correspondence took place prior to the Council's series of decision on June 12, 2003 with its conclusions on when a requestor is a prevailing party and entitled to reasonable attorney fees.

Analysis and Conclusion

With regard to the requestor's prevailing party claim, on June, 12, in a series of cases involving this same requestor, the GRC concluded that attorney fees may be awarded under OPRA only where the requestor has obtained a final decision from the GRC that the record in question must be disclosed.² OPRA and relevant case law do not support an award of attorney's fees where the requested record is released after a complaint is filed with the GRC but before a final administrative determination is rendered.

In this case, the custodian has now voluntarily provided full access to the requested record at issue. Thus, there is no remaining issue for adjudication by the GRC concerning disclosure of the document. Based on the above-mentioned cases, the requestor is not a prevailing party because the Council did not make a determination that the records should be disclosed.

Based on the custodian's voluntary release of the invoice and description of services rendered, the only issue remaining for Council adjudication is whether there has been a knowing and willing violation of OPRA that resulted in an unreasonable denial of access under the totality of the circumstances (N.J.S.A. 47:1A-11).

The determination of whether the redactions were privileged or not and should have been disclosed within the OPRA time requirements, becomes relevant only to the extent that it bears on this issue. In this case, the GRC does not need to reach this determination because there is not evidence to support a finding that the redactions were knowingly and willfully made in violation of OPRA.

The conduct of the Township does not justify a finding of a violation under N.J.S.A. 47:1A-11. It is noted that this case was filed in the early days of OPRA, and to the extent that this case provides instruction to this custodian, custodian's counsel, and others that must in the future address the issue of redaction and privileges, the Executive Director notes that:

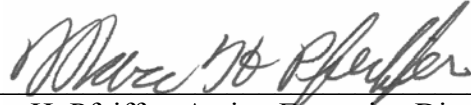
- The initial redactions were over-broad, as evidenced by revisions by the custodian of the voucher that disclosed additional information,
- All privileges should be claimed in the initial response; in this case the privilege claim "evolved" to include the "deliberative process" privilege, codified in OPRA as the "inter-agency, intra-agency, advisory, consultative, or deliberative material" privilege to disclosure.

To conclude, the Executive Director finds that:

1. The Township voluntarily disclosed the requested record and the requestor is not a prevailing party for the purposes of awarding attorney fees under OPRA.
2. For purposes of determining if there has been a violation of N.J.S.A. 47:1A-11, although the Township was less than thorough in complying with the OPRA requirements for providing an explanation why information was redacted from the requested record, there is no evidence to support a finding that the custodian knowingly and willfully violated OPRA.

² GRC Complaints 2002-34, 35, and 36, L.E. Fisher vs. various parties.

For these reasons, the Executive Director recommends that this complaint be dismissed.

A handwritten signature in cursive script, reading "Marc H. Pfeiffer", written in dark ink.

Marc H. Pfeiffer, Acting Executive Director
Government Records Council

Dated: September 5, 2003